No. 86-1059

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MILDRED BAILEY BELL, PETITIONER

v.

JOHN THOMAS BELL, JR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Rules 11, 26(g), and 37(c) of the Federal Rules of Civil Procedure, as amended in 1983, provide that sanctions "shall" be imposed when those rules have been violated. The questions presented are:

(a) When the record establishes that Rules 11, 26(g), and 37(c) have in fact been violated, does the district court have discretion to refuse to impose any sanction at all?

(b) If sanctions are mandatory when violations have been established, does the court have discretion to determine that "no sanction" is "the appropriate sanction" to be imposed?

(c) If sanctions are not mandatory, does the court abuse its discretion, as a matter of law, by refusing to impose sanctions when the record establishes that throughout the proceedings the facts, the

law, the evidence, and even the contents of the record itself were misrepresented to the court?

2.

In the district court Petitioner also moved for sanctions under 28 U.S.C. § 1927 (for unreasonable and vexatious multiplication and proliferation of the proceedings) and under Local Rule C-10 (N.D. Miss., 1983) for refusing to stipulate for purposes of the pretrial order facts that were not in good faith disputed). The motion was denied and Petitioner appealed.

(a) Was it error for the court of appeals to refuse to review Petitioner's contentions with respect to violations of § 1927 and Local Rule C-10 because it appeared to the appellate court that the district court had denied Petitioner's motion for sanctions without addressing those contions?

(b) Having refused to consider Petition-

er's contentions with respect to violations of § 1927 and Local Rule C-10, was it error for the court of appeals to enter judgment affirming the district court's denial of sanctions under those provisions?

PARTIES BELOW

All parties below are listed in the caption of this petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Mildred B. Bell respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion entered by the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, affirming the district court's Order denying

Petitioner's motion for sanctions was not reported. It appears in the Appendix to this petition, beginning at page A.1, infra. The Order of the court of appeals denying a timely petition for rehearing en banc appears at page A.18.

The district court's Order denying petitioner's post-judgment motion for sanctions, also unreported, is set forth in the Appendix, beginning at page A.14.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1986 [A.16]. A timely petition for en banc rehearing was filed on September 30, 1986, and was denied on October 17, 1986 [A.18].

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES

Section 1927 of the Judicial Code, 28 U.S.C. § 1927 (as amended Sept. 12, 1980, Pub. L. 96-349, § 3, 94 Stat. 1156),

provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Rule 11 of the Federal Rules of Civil Procedure (as amended Apr. 28, 1983, eff. Aug. 1, 1983) provides, in pertinent part, as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties

> the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 26(g), Fed. R. Civ. Proc. (as amended Apr. 28, 1983, eff. Aug. 1, 1983), provides in pertinent part as follows:

> Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record . . . . The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. . . .
>
> If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or ob-

jection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 37(c), Fed. R. Civ. Proc. (as amended Mar. 30, 1970, eff. July 1, 1970), provides as follows:

> If a party fails to admit . . . the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the . . . truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

Local Rule C-10 (N.D. Miss., 1983 provides as follows:

> (b) To the end that the court's business may be facilitated, delay avoided, and the expense of litigation held to a minimum, it shall be the absolute duty of counsel for

all parties:

(1) to resolve by stipulations, to be included in the pre-trial order or equivalent document in each case, all relevant facts which are not in good faith controverted.

* * * * *

The failure of counsel to fulfill the above obligation will be regarded as a serious violation of this rule, and may result in the imposition of appropriate sanctions against the responsible attorney, or his client, or both.

STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of Mississippi as an action to domesticate and enforce a 1974 Georgia judgment. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of Georgia and the defendant a citizen of Mississippi.

The Complaint, filed by Petitioner in April 1985, alleged that Respondent had refused to make payments required by the

Georgia judgment. [Record, p. 2 (R. 2)].

Respondent's Answer admitted the jurisdictional facts (by failing to deny), admitted that a duly authenticated copy of the Georgia judgment was attached to the Complaint, and admitted that the Georgia judgment was a final judgment. Nevertheless, lack of jurisdiction and failure to state a claim were the only defenses asserted, except that the Answer denied that Respondent was in arrears (without asserting any affirmative defense to Petitioner's allegation of arrearages). [R. 11-13].

Shortly thereafter, Petitioner filed a motion for judgment on the pleadings (to domesticate the Georgia judgment) and a motion for a post-domestication show cause order. The show cause motion was supported by Petitioner's affidavit setting out in detail the arrearages that formed the basis of her Complaint.

Respondent did not file a counteraffidavit with respect to Petitioner's affidavit of arrearages. However, although he had admitted in his Answer that the Georgia judgment is a final one, Respondent opposed Petitioner's motions by asserting that the Georgia judgment is not a final judgment, and he cited numerous cases which he claimed supported the propositions of law asserted in his Response. [1st Suppl. Record, pp. 102-107]. Petitioner's Reply in support of her motions pointed out that the cases cited by Respondent in fact directly contradict the propositions for which they were cited,[1] and

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[1]For example, Respondent attached to his Response a copy of a 1977 Georgia statute and stated, "The court will note that the divorce in the case at bar was granted in 1974, but the [1977] statuts is applicable to that divorce." As authority for that proposition he cited Summerlin v. Summerlin, 274 S.E.2d 523 (Ga. 1981). [1st Suppl. R., pp. 105-106]. What the Georgia Supreme Court actually said in Summerlin was, "[T]he applicable modification statute is that statute in effect at the time of the divorce." [Emphasis added]. 274

noted that the Response appeared to have been certified in violation of Rule 11.

The district court denied Petitioner's motions for judgment on the pleadings and for a show cause order on the ground that, in the court's view, the Georgia judgment could not be domesticated until arrearages had been established. The district court stated that since matters outside the pleadings (i.e., the affidavit of arrearages which Petitioner had submitted in sup-

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S.E.2d at 524.

As another example, Respondent informed the court that "awards of child support and alimony have been and may be retrospectively modified in Georgia," citing as authority Skinner v. Skinner, 314 S.E.2d 897 (Ga. 1984). [1st Suppl. R., p. 106]. What the Skinner court in fact said was, "An order modifying an alimony-child support award can operate only prospectively, i.e., it is not to be given retroactive application." 314 S.E.2d at 899.

In the court of appeals, Respondent argued that these (and other misrepresented cases) were not misrepresentations; they were, he asserted, merely differences of opinion with respect to legal theory. [Respondent's "Brief of the Appellee," pp. 7-8, 13].

port of the motion for show cause order) could not be considered in conjunction with the motion for judgment on the pleadings, both the motion for judgment on the pleadings and the motion for a post-domestication show cause order were being denied. [R. 26-28].

Petitioner subsequently filed a motion for summary judgment. Respondent opposed that motion, asserting that summary judgment would be improper because the case contained such complex issues of law and fact. [1st Suppl. Record 155-158]. The motion was denied. [R. 78-79].

Following a bench trial in January 1986, judgment was entered on February 24, 1986, domesticating the Georgia judgment and determining Respondent's arrearages thereunder.

After judgment was entered in her favor, Petitioner filed a post-judgment motion

for sanctions in which she sought to have sanctions imposed upon Respondent and his attorney under Rules 11, 26(g), and 37(c) of the Federal Rules of Civil Procedure; under Local Rule C-10 (N.D. Miss., 1983); and under 28 U.S.C. § 1927.

As grounds for her motion Petitioner asserted, inter alia, (1) that Respondent's discovery responses violated Rule 37(c) on their face in that he refused to admit relevant matters when requested to do so, stating only that he lacked knowledge, that he lacked personal knowledge, or that petitioner already knew the answer; (2) that Respondent's attorney had certified discovery responses in violation of Rule 26(g); (3) that papers containing frivolous defenses, contentions, and arguments, as well as misrepresentations of law and fact, had been certified in violation of Rule 11; (4) that Respondent had violated

Local Rule C-10 (N.D. Miss., 1983) by refusing to admit for purposes of the pretrial order relevant matters which were not in good faith controverted; and (5) that Respondent's attorney had violated 28 U.S.C. § 1927 by unreasonably and vexatiously multiplying and proliferating the proceedings. [R. 92-96].

Copies of Respondent's discovery responses were attached as Exhibits to the motion [R. 97-115], and the motion itself referred to specific portions of the record which Petitioner contended established the violations of which she complained and therefore made the imposition of sanctions mandatory.

The district court did not issue a memorandum opinion but denied Petitioner's motion by entering the following Order [A.14, infra]:

> After reviewing the plaintiff's post-judgment motion for sanctions, the defendant's response thereto,

> and the plaintiff's reply, the court is of the opinion that while each party herein is far from being a model litigant, the award of sanctions is not appropriate for either party. The court finds that the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules.
>
> Accordingly, it is Ordered that the plaintiff's motion for sanctions and the defendant's motion for sanctions should be and are hereby denied.[2]

Petitioner appealed, contending that the record establishes unequivocally that

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[2]Defendant did not file a motion for sanctions; the district court apparently treated his Response to Petitioner's motion as a motion itself. The Response was replete with misrepresentations of fact, of law, and of the record itself, and provided an incredible example of deliberate false certification under Rule 11. See Petitioner's "Reply in Support of Motion for Sanctions," (R. pp. 136-145).

The district court stated that it had reviewed both Defendant's Response and Petitioner's Reply thereto. Nevertheless, the court of appeals refused to consider Petitioner's contention on that point, stating "[W]e are uncertain whether the district court considered this asserted violation when denying sanctions. Accordingly, we decline to consider it in reviewing the denial of sanctions." [A.4-5, infra, at n.1].

Rules 11, 26(g), and 37(c) were violated; that the district court therefore did not have discretion to refuse to impose sanctions; that even if the amended Rules did vest the district courts with such discretion, refusal to impose sanctions on the facts of this case would constitute an abuse of that discretion; and that the district court abused the discretion it has under 28 U.S.C. § 1927 and Local Rule C-10 (N.D. Miss.) by refusing to impose sanctions under those provisions.

On September 17, 1986, judgment was entered by the Fifth Circuit, affirming the lower court's Order denying sanctions. The court of appeals stated, in pertinent part, as follows:

> We understand the district court to have concluded that, although there may have been violations of the rules, the appropriate sanction under the circumstances of this case was no sanction. We are not constrained to say that the district court must, upon the establishment of a violation of the rules at issue

> here, impose some sort of sanction however nominal. . . . [P]laintiff has failed to show any abuse of discretion in the district court's conclusion that no sanction was the appropriate sanction. [A.11].

The court of appeals declined to review Petitioner's contention that the district court abused its discretion by refusing to impose sanctions under 28 U.S.C. § 1927 and Local Rule C-10 (N.D. Miss.):

> Plaintiff also contends that sanctions should be imposed under N.D. Miss. Rule C-10 and 28 U.S.C. § 1927. Apparently, the district court did not address these contentions. See supra at p. 2 [sic] of district court order denying sanctions.[3] Accordingly, we decline to review them. [A.6 at n.2].

Nevertheless, without remanding, the court affirmed the district court's denial of sanctions under those provisions.

A timely petition for en banc rehearing was denied by the Fifth Circuit on October 17, 1986. [A.18].

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[3]Since the district court's order contained only one page, the reference to page 2 of the district court order appears to be a clerical error.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION THAT SANCTIONS ARE NOT MANDATORY WHEN RULES 11, 26(g), AND 37(c) HAVE BEEN VIOLATED IS IN DIRECT CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND, SIXTH, AND D.C. CIRCUITS.

The Fifth Circuit decided in this case that the Federal Rules of Civil Procedure do not require the district courts to impose any sanction when Rules 11, 26(g), and 37(c) have been violated.

Although the court's Opinion states that the decision is based upon well-settled principles of law, Petitioner has found no reported cases in which either the Fifth Circuit or any other federal appellate court has so ruled, and the Opinion does not refer to any.

The decision is contrary to the language of the Rules themselves, and it is contrary to both the 1970 Advisory Committee Notes regarding Rule 37(c) and the 1983 Notes re-

garding Rules 11 and 26(g). Furthermore, the decision is in direct conflict with the decisions of all other courts of appeals that have ruled upon the question, and conflicts in principle with the views expressed by Circuits which have not yet had occasion to rule upon the question.

A. Rule 11 and Rule 26(g) provide that if papers are certified in violation of those rules the court "shall" impose an appropriate sanction.

Rule 11 and Rule 26(g) vest the district courts with discretion to fashion "an appropriate sanction" when the rules have been violated, but both rules specifically provide that an appropriate sanction shall be imposed.

The Advisory Committee's Notes to the 1983 Amendment of Rule 11 point out that Rule 11 now imposes upon attorneys an affirmative duty to inquire into both the facts and the law before certifying pleadings and other papers. The Committee Notes

also state that the text of amended Rule 11 "seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked." [Emphasis added]. 1983 Advisory Committee Note, Rule 11.

With respect to the 1983 Amendment of Rule 26, the Committee Notes emphasize that the new rule requires judges to exercise their authority to impose sanctions on attorneys who abuse the discovery rules. "The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g)." 1983 Advisory Committee Note, Rule 26(g).

Most cases that have reached the appellate courts under the Amended Rules have arrived there for review of lower court orders imposing sanctions, and the appellate courts therefore have had to deter-

mine whether the district court erred in its conclusion that the rule had been violated, or whether it abused its discretion in determining that a particular sanction was an appropriate sanction in the circumstances. E.g., Hale v. Harney, 786 F.2d 688 (5th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

The Second, Sixth, and District of Columbia Circuits have, however, reviewed cases in which the district court (as in the present case) denied sanctions even though the record established that Rule 11's certification requirement had been violated. All three Circuits held that once a violation is established Rule 11 mandates that sanctions be imposed. Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986); Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985); Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985).

The Ninth Circuit has not yet ruled upon a case in which sanctions were denied even though violations had been established, but in several well-reasoned opinions that court has stated that it too considers sanctions to be mandatory. Unioil, Inc. v. E.F. Hutton & Co., 802 F.2d 1080 (9th Cir. 1986); Huettig & Schromm, Inc. v. Landscape Contractors Council, 790 F.2d 1421 (9th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

Furthermore, the Seventh Circuit, without specifically addressing the question of whether Rule 11 mandates such a result, has served notice on attorneys practicing in the Seventh Circuit that sanctions will be imposed when the requirements of Rule 11 are violated. See Dreis & Krump Manufacturing Co. v. International Association of Machinists & Aerospace Workers, District No. 8, 802 F.2d 247 (7th Cir. 1986).

B. Rule 37(c) specifies the sanction that must be imposed when a party has unjustifiably refused to admit as requested under Rule 36.

Rule 37(c) is intended to provide post-trial relief when a party has improperly refused to admit when requested to do so under Rule 36. All failures to admit (without good cause) are within its scope. 1970 Advisory Committee Notes, Rule 37(c).

Rule 37(c) does not vest the district courts with discretion to fashion an appropriate sanction when that rule has been violated; the rule itself specifies the very sanction that shall be imposed, i.e., costs incurred as the result of an unjustifiable failure to admit.

C. The decision below cannot be reconciled with the decisions from other Circuits merely by saying that "no sanction" may be "the appropriate sanction" to impose for Rule violations.

The Fifth Circuit's conclusion that a denial of sanctions may be the appropriate sanction to impose upon a party who has violated the Rules is a contradiction in

terms when applied to Rule 11 and Rule 26(g), and it cannot even arguably support a denial of sanctions under Rule 37(c), since that Rule does not vest the court with any discretion regarding the sanction to be imposed.

The Fifth Circuit itself noted that the mandatory language of Rules 11, 26(g), and 37(c) "certainly suggests" that the district courts do not have discretion to decide whether sanctions will be imposed when the rules have been violated. [A.6-7, infra]. The court quoted language from cases and other authorities directly supporting the proposition that sanctions are mandatory [A.6-10, infra, text & nn. 3,6], and then indicated its disagreement with those authorities by stating: "We are not constrained to say that the district court must, upon the establishment of a violation of the rules at issue here, impose some sort of sanction however nominal." [A.11-12].

No other appellate court has ruled that sanctions are not mandatory when Rules 11, 26(g), and 37(c) have been violated, and no other appellate court has even suggested that the duty imposed upon the courts by those Rules can be properly discharged by imposing a nominal sanction. Moreover, imposition of a nominal sanction clearly would be inappropriate where, as here, the record establishes that the Rules were not merely violated, but were instead flouted.

It cannot be assumed that the decision below reflects the views of only the reviewing panel and therefore will have little or no effect upon decisions in other cases; it is well settled in the Fifth Circuit that the panel's decision (i.e., that district courts have discretion to refuse to impose sanctions even though violations have been established) will have to be followed by other Fifth Circuit panels. See, e.g., United States v. Alfrey, 620 F.2d

551 (5th Cir.), cert. denied, 449 U.S. 938 (1980); Puckett v. Commissioner, 522 F.2d 1385 (5th Cir. 1975).

If not resolved by this court, the split in the Circuits created by the decision below will seriously impair the effectiveness of the 1983 Amendments in minimizing abuse of the judicial process. Furthermore, since sanctions serve the dual purposes of punishment and deterrence, a conflict among the Circuits on the question of whether sanctions are mandatory should not be permitted to stand.

II.

THE DECISION BELOW THAT SANCTIONS ARE NOT MANDATORY WHEN RULE VIOLATIONS HAVE BEEN ESTABLISHED RAISES A SIGNIFICANT PROBLEM CONCERNING THE STANDARD OF REVIEW IN SUCH CASES.

The motion for sanctions filed by Petitioner in the district court was prompted by what was, in Petitioner's view, an egregious abuse of the judicial process throughout the proceedings. The allegations in

Petitioner's motion were in every instance supported by references to the record establishing that the conduct Petitioner complained of had in fact been engaged in.

The district court summarily denied the motion for sanctions without any explanation except that, in the court's view, the conduct "did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules." [Emphasis added]. [A.14]. This, according to the court of appeals, meant that "the district court . . . concluded that, although there may have been violations of the rules, the appropriate sanction under the circumstances of this case was no sanction." [A.11]. Thus, both courts below indicated that in some unspecified circumstances conduct which is expressly forbidden by the Federal Rules may be engaged in with impunity.[4]

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[4]It is highly unlikely that a decision of this kind will go unnoticed by the practicing bar, espe-

The Fifth Circuit, like the district court, did not address any of the basic issues raised by Petitioner's specific allegations of misconduct, and the appellate court's Opinion did not offer even a clue as to how the appellate court determined that the district court did not abuse its discretion.

If the district courts are not required to apply the criteria specified in the Rules (e.g., good-faith belief and reasonable inquiry) in determining whether sanctions are to be imposed, what criteria are they permitted to use? And if, as here, the district courts need not enunciate the criteria they in fact apply, how can the appellate courts determine whether there has been an abuse of discretion?

What criteria did the courts below ap-

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cially in light of the Fifth Circuit's rule that all panels must follow rules of law laid down by prior Fifth Circuit panels. See supra, pp. 23-24.

ply in the instant case? What circumstances could justify a refusal to impose sanctions for repeatedly making flagrant misrepresentations of law and fact to the court? What circumstances could justify a refusal to impose sanctions for filing patently frivolous defenses?

In the court below, Respondent argued that the defenses Petitioner contended were frivolous on their face were merely the same "standard, boiler-plate defenses used by experienced counsel in almost all federal and state litigation." [Respondent's "Brief of the Appellee," p. 8; see also id. at 16].

Are the district courts permitted to excuse the filing of frivolous papers so long as their frivolity relates to "standard boilerplate" claims, defenses, or arguments?

In the courts below Respondent's attorney argued that his conduct was not extra-

ordinary, that he has been practicing law for some thirteen years and that the propriety of his conduct has never been challenged until now. (The real problem, he suggested, is that Petitioner--who is not a practicing attorney--simply does not understand how the judicial system operates.)

What circumstances could possibly justify a district court's refusal to impose sanctions for such repeated violations of the Federal Rules? And would not an appropriate sanction take into account the number of violations, the nature of the violations, and the fact that Respondent was represented by experienced counsel?

When the Federal Rules of Civil Procedure were amended in 1983, it appeared that this Court itself had specified in the Rules the criteria to be applied in determining when sanctions are to be imposed. And those are the criteria being applied in the other Circuits. If the Rules do in

fact permit the district courts to refuse to impose sanctions when violations of the Rules have been established, as the Fifth Circuit has ruled, then Petitioner respectfully submits that this Court should specify what circumstances the district courts may properly take into account in deciding whether to impose sanctions, and therefore what criteria must be used by the appellate courts in reviewing such action by a district court. Otherwise, it would appear that the district courts in the Fifth Circuit have unfettered discretion.

III.

BECAUSE THE COURT OF APPEALS REFUSED TO CONSIDER PETITIONER'S CONTENTIONS CONCERNING VIOLATIONS OF 28 U.S.C. § 1927 AND LOCAL RULE C-10 (N.D. MISS.), IT WAS PLAIN ERROR TO AFFIRM THE DISTRICT COURT'S ADVERSE RULING ON THOSE ISSUES.

The court of appeals refused to review Petitioner's contentions with respect to violations of 28 U.S.C. § 1927 and Local Rule C-10 (N.D. Miss.). [A.6 at n.2].

Nevertheless, the court affirmed the district court's denial of sanctions under those provisions.

The Opinion of the court of appeals stated that since the district court apparently did not address Petitioner's contentions, then the Fifth Circuit would not do so either. It is a fact, however, that the district court denied Petitioner's motion for sanctions under those provisions (as well as under the Federal Rules), and it is a fact that the court of appeals affirmed the district court's Order denying sanctions on all grounds.

It is axiomatic that when a party fails to raise issues below those issues usually will not be considered on appeal. The Fifth Circuit appears to be extending that principle by deciding that if the district court fails to consider issues properly raised in that court, the appellate court will not review the district court's rul-

ing upon those issues.

A final Order entered by the district court is not rendered nonreviewable by the district court's failure to address the issues. At the very least, such a case would have to be remanded with instructions to address the issues so that the appellate court can review the lower court's ruling.

In this case, however, the district court's Order specifically stated that the court had considered Plaintiff's motion, Defendant's response, and Plaintiff's reply. The question to be considered on appeal was whether the district court's refusal to impose sanctions against Respondent's attorney under § 1927 (for having unreasonably and vexatiously multiplied and proliferated the proceedings) and against Respondent or his attorney, or both, under Local Rule C-10 (for having refused to stipulate for purposes of the

pretrial order matters which were not in good faith controverted) was an abuse of discretion under those provisions.

Petitioner's motion for sanctions relied solely on the written record to establish her contention that Respondent, by disregarding the requirements of the Federal Rules, managed to prolong for ten months a simple suit to domesticate a foreign judgment--a suit in which there were never any genuine issues of material fact (as the transcript of Respondent's trial testimony makes clear). The appellate court therefore would not have needed to remand the case even if the district court failed to consider Petitioner's contentions. The record itself shows that denial of sanctions in this case was, as a matter of law, an abuse of discretion.

What the Fifth Circuit has decided, in effect, is that when a district court arbitrarily denies a motion for sanctions,

without considering the issues, the district court's ruling will not be reviewed by the court of appeals but will automatically be affirmed. That decision is patently erroneous, and petitioner respectfully submits that this Court, in the exercise of its supervisory powers, should not permit it to stand.

CONCLUSION

For the reasons set forth above, Petitioner prays that the Writ of Certiorari issue to review the decision of the Fifth Circuit in this case, and respectfully suggests that summary reversal would be appropriate.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4321

(District Court Docket No. EC85-193-GD-D)

MILDRED BAILEY BELL,

Plaintiff-Appellant,

versus

JOHN THOMAS BELL, JR.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

[Submitted on Briefs]

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

OPINION OF THE COURT

[Filed September 17, 1986]

JOHNSON, Circuit Judge:*

Plaintiff Mildred Bailey Bell appeals

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

from the district court's denial of her postjudgment motion for sanctions. We affirm the district court's denial of the motion.

I. FACTS AND PROCEDURAL HISTORY

The facts and the procedural history in this case are set forth in our opinion concerning plaintiff Bell's appeal no. 86-4196 from the judgment of the district court.

After judgment had been rendered, plaintiff Bell moved the district court to impose sanctions upon both the defendant, John Thomas Bell, Jr., and his attorney. The district court denied the motion:

> After reviewing the plaintiff's postjudgment motion for sanctions, the defendant's response thereto, and the plaintiff's reply, the court is of the opinion that while each party herein is far from being a model litigant, the award of sanctions is not appropriate for either party. The court finds that the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules.

Bell v. Bell, No. EC 85-193-GD-D. Plain-

tiff Bell now separately appeals from the district court's denial of her postjudgment motion for sanctions.

II. DISCUSSION

Assignments of Error

On appeal, plaintiff Bell argues that the district court erred in refusing to impose sanctions under Federal Rule of Civil Procedure ("Federal Rule") 11 for the following asserted violations of that rule (as described by plaintiff):

1. Defendant Bell's Response to Motion for Judgment on the Pleadings and Motion for Order to Show Cause asserted that plaintiff was relying "upon affidavits and copies of pleadings in other litigation, all of which are attached to the motion." In fact, plaintiff had attached only one affidavit, which made references to the agreement incorporated by the Georgia decree.

2. The same Response miscited (and at-

tached copies of) Georgia cases in support of an argument that plaintiff was seeking to enforce a judgment lacking finality.

3. Defendant's requests for time extensions--three of four were granted--were made solely to harass, delay, or increase litigation costs. One of the requests asserted that both parties intended to file a consent to trial by magistrate when this was not the case.

4. Defendant's Answer falsely denied arrearage in payments under the Georgia decree and frivolously asserted defenses of failure to state a claim and lack of jurisdiction.[1]

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[1]Plaintiff further argues that defendant's Memorandum in Opposition to Plaintiff's Post-Judgment Motion for Sanctions violated Federal Rule 11. This asserted violation was not presented to the district court. Plaintiff did, in her Reply in the district court to defendant's Memorandum, state that this Memorandum was "scurrilous" and "patently false" in certain respects and that "Defendant's attorney should be reprimanded." Nevertheless, we are uncertain whether the district court considered this asserted violation when

Plaintiff also asserts error in the district court's refusal to impose sanctions under Federal Rule 37(c) for defendant's failure to make certain requested admissions. Instead, he asserted that he lacked knowledge, that plaintiff already knew the answer, and that the same admis-

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denying sanctions. Accordingly, we decline to consider it in reviewing the denial of sanctions.

Plaintiff also suggests that attorney certification of certain discovery responses violated Federal Rule 11. The sanction provision of Rule 11 by its terms applies to every "pleading, motion, or other paper" signed in violation of the rule. Nevertheless, a note to the rule advises: "Although the encompassing reference to 'other papers' in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11." See also In re Yagman, Nos. 84-5839, 84-5957, n.25 & accompanying text (9th Cir. Aug. 13, 1986) (available Sept. 5, 1986, on WESTLAW; to be reported at 796 F.2d 1165); see Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986) (Rule 11 is not "properly used to sanction the inappropriate filing of papers where other rules more directly apply. For example, excessive discovery requests should be dealt with under Rule 26(g) rather than Rule 11 . . . .") Accordingly, we take up the asserted certification violations in discovery responses in our consideration infra of Federal Rule 26(g).

sion had already been made in previous litigation between the parties.

Finally, plaintiff argues district court error in declining to apply sanctions under Federal Rule 26(g) for interrogatory responses that failed to provide certain information on the ground that it had been supplied in previous litigation between the parties.[2]

Analysis

Plaintiff argues that, once a violation has been established, Federal Rule 11, as amended in 1983, deprives the district court of all discretion in deciding whether to impose an appropriate sanction. The rule's mandatory language certainly suggests this interpretation: "If a

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[2]Plaintiff also contends that sanctions should be imposed under N.D. Miss. Rule C-10 and 28 U.S.C. § 1927. Apparently, the district court did not address these contentions. See supra at p. 2 text of district court order denying sanctions. Accordingly, we decline to review them.

pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ." Fed. R. Civ. P. 11 (emphasis supplied).[3] Nevertheless, the district court clearly retains discretion to determine what is an "appropriate sanction" under the circumstances. Id.[4]

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[3] See Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986) ("Rule 11 expressly mandates the imposition of sanctions once a violation is found"); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985) ("Unlike the statutory provisions that vest the district court with 'discretion' to award fees, Rule 11 is clearly phrased as a directive. Accordingly, where strictures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions.").

[4] "Under Rule 11, the district court 'has discretion to tailor sanctions to the particular facts of the case, with which it should be familiar.'" Davis v. Veslan Enters., 765 F.2d 494, 501 (5th Cir. 1985) (quoting Fed. R. Civ. P. 11 advisory committee note); see also Albright, 788 F.2d at 1222 ("'The selection of the type of sanction to be imposed lies of course within the district court's sound exercise of discretion.'" (quoting

Analysis of the similar language of Federal Rule 26(g) suggests similar conclusions. After providing that every request for discovery or response or objection thereto shall be signed and that the signature of the attorney or party constitutes a certification as to certain listed matters, the rule provides, "If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction . . . ." Fed. R. Civ. P. 26(g) (emphasis supplied). A note to the rule explains: The "rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the

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Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985)); Eastway Constr. Corp., 762 F.2d at 254 n.7 ("the district courts retain broad discretion in fashioning sanctions").

first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances." Id. advisory committee note.[5]

Federal Rule 37(c) contains similarly mandatory language. If a party has failed to make a requested admission as to a matter later proven to be true then the rule permits the requesting party to apply to the court for an order requiring the first party to pay him the reasonable expenses incurred in making that proof. The rule further provides:

> The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial im-

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[5] See In re MacMeekin, 722 F.2d 32, 35 (3d Cir. 1983) ("The recent amendments to the Rules of Civil Procedure," including Rules 11 & 26(g), "emphasize the obligation of trial judges to consider an award of expenses and attorney's fees when violations of the rules occur.").

> portance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c) (emphasis supplied). This Court, speaking of Rule 37(c), has stated that "if certain requirements are not met the court shall impose sanctions upon application or motion." **Dorey v. Dorey**, 609 F.2d 1128, 1135 (5th Cir. 1980) (emphasis in original).[6] The **Dorey** court further acknowledged, however, that the "district court has broad, although not unbridled, discretion in imposing sanctions . . . under Rule 37." Id.[7]

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[6] See 8 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 2290, at 804 (1970) ("The court is required to make the award of expenses and fees to a party who comes within Rule 37(c) unless it finds that one of four specified conditions exists." (Footnote omitted).

[7] Chemical Eng'g Corp. v. Essef Indus., Inc., 795 F.2d 1565, 1575 (Fed. Cir. 1986) (applying abuse of discretion standard of review to district court grant of Rule 37(c) sanctions); Williams

The district court in the present case stated that "the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules." We understand the district court to have concluded that, although there may have been violations of the rules, the appropriate sanction under the circumstances of this case was no sanction. We are not

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v. State Farm Mut. Auto. Ins. Co., 737 F.2d 741, 746 (8th Cir. 1984) (applying abuse of discretion standard of review to district court denial of Rule 37(c) sanctions), cert. denied, ___ U.S. ___, 105 S. Ct. 910 (1985); White Consol. Indus., Inc. v. Vega Servo-Control, Inc., 713 F.2d 788, 792 (Fed. Cir. 1983) (same).

We note that a similar conclusion would likely result if plaintiff's contentions based on N.D. Miss. Rule C-10 and 28 U.S.C. § 1927 were properly before us. See supra note 2. The rule provides that a violation of the rule "may result in the imposition of appropriate sanctions." N.D. Miss. Rule C-10(b) (emphasis supplied). Also, we have applied an abuse of discretion standard of review in § 1927 cases. Jackson Marine Corp. v. Harvey Barge Repair, Inc., 794 F.2d 989, 992 (5th Cir. 1986); In re Ginther, 791 F.2d 1151, 1155 (5th Cir. 1986); Warren v. Reserve Fund, Inc., 728 F.2d 741, 748 (5th Cir. 1984).

constrained to say that the district court must, upon the establishment of a violation of the rules at issue here, impose some sort of sanction however nominal.[8] We have examined plaintiff's contentions and the record in this case and "are not left with a '"definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors."'" **Dorey**, 609 F.2d at 1135-36 (quoting **Wilson v. Volkswagen of America, Inc.**, 561 F.2d 494, 506 (4th Cir. 1977)). Accordingly, plaintiff has failed to show any abuse of discretion in the district court's conclusion that no sanction was the appropriate sanction.

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[8] Contra Westmoreland, 770 F.2d at 1174-75 ("once the court finds that . . . factors [showing breach of Rule 11] exist, Rule 11 requires that sanctions of some sort be imposed" (emphasis in original)).

III. Conclusion

For the reasons stated, we affirm the district court's denial of plaintiff's postjudgment motion for sanctions.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MILDRED BAILEY BELL

Plaintiff

V

Civil Action No.
EC 85-193-GD-D

JOHN THOMAS BELL, JR.

Defendant

ORDER DENYING SANCTIONS

[Filed April 15, 1986]

After reviewing the plaintiff's post-judgment motion for sanctions, the defendant's response thereto, and the plaintiff's reply, the court is of the opinion that while each party herein is far from being a model litigant, the award of sanctions is not appropriate for either party. The court finds that the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules.

Accordingly, it is **Ordered** that the plaintiff's motion for sanctions and the defendant's motion for sanctions should be and are hereby denied.

THIS 14th day of April, 1986.

Glen H. Davidson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4321
Summary Calendar

D.C. Docket No. EC85-193-GD-D

MILDRED BAILEY BELL,

Plaintiff-Appellant,

versus

JOHN THOMAS BELL, JR.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

JUDGMENT

[Sept. 17, 1986; Mandate Issued Oct. 27, 1986]

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 17, 1986

ISSUED AS MANDATE: Oct. 27, 1986.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4321

MILDRED BAILEY BELL,

Plaintiff-Appellant,

versus

JOHN THOMAS BELL, JR.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC
[Filed Oct. 17, 1986]
[Opinion filed Sept. 17, 1986]

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel

nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Sam Johnson
United States Circuit Judge
10/14/86

No. 86-1059

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MILDRED BAILEY BELL, PETITIONER

v.

JOHN THOMAS BELL, JR., RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dolton W. McAlpin,
Attorney for Respondent
P. O. Box 867
109 North Jackson Street
Starkville, MS 39759
(601) 323-9743

No. 86-1059

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MILDRED BAILEY BELL, PETITIONER

v.

JOHN THOMAS BELL, JR., RESPONDENT

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FEDERAL RULES OF CIVIL PROCEDURE:

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JURISDICTION AND PARTIES

The Petitioner has correctly set out the jurisdiction of this Court and the parties to this proceeding.

STATUTES AND RULES

The Petitioner has correctly set out the applicable statutes and rules.

STATEMENT OF THE CASE

The Statement of the Case provided by the Petitioner is procedurally correct. Post-trial, the Petitioner filed a Motion for Sanctions, which the district judge denied. On pages 11 and 12 of her Petition for Writ of Certiorari the Petitioner sets out the grounds for her motion:

1. Respondent's discovery responses violated Rule 37(c);

2. Respondent's attorney certified discovery responses in violation of Rule 26(g);

3. Papers containing frivolous defenses, contentions, and arguments, as well as misrepresentations of law and fact, had been certified in violation of Rule 11;

4. Respondent had violated Local Rule C-10 of the Northern District of Mississippi by refusing to admit for pre-trial purposes relevant matters which were not in good faith controverted;

5. Respondent's attorney violated 28 U.S.C. 1927 by unreasonably and vexatiously multiplying and proliferating the proceedings.

Respondent believes that this Court should have at least an inkling of the nature of the specific offenses charged while considering whether or not to grant certiorari in this matter. Therefore, the Respondent will set out herein, briefly, the offenses charged and examples of each, as will be reflected by the record in this case. This listing, of course, does not purport to be exhaustive.

A. DISCOVERY RESPONSES VIOLATED RULE 37(c) AND RULE 26(g). The respondent's complaints here fell into two areas: (1) responses to requests for admissions; and (2) answers to interrogatories.

Several of the requests for admissions and their responses were of the following nature:

> REQUEST: You sent nothing to the education fund during the months of July 1981 through March 1982.

RESPONSE: Defendant objects to responding to this request for admission for the reason that an identical request for admission was responded to in litigation styled Bell v. Bell, Civil Action Number 63534 D-2 in the Superior Court of Bibb County, State of Georgia.

Other requests for admission concerned matters outside the knowledge of the respondent, such as:

REQUEST: Ansley was enrolled as a student in Mercer University's part-time graduate program in business administration from June 1981 until the spring of 1982.

RESPONSE: The defendant can neither admit or deny this request for admission because the only knowledge the defendant has of this statement is the information he received from the plaintiff.

Several of the Respondent's interrogatory answers were used as bases for Petitioner's Motion for Sanctions, among them the following:

INTERROGATORY NO. 1: Please state the amount of your gross salary in your employment con-

tract as a Professor at Mississippi State University, for each contract year since 1980, beginning with the 1981-1982 contract year.

ANSWER: The defendant objects to answering this interrogatory, the said information having been furnished to the plaintiff by way of answer to interrogatory and by way of production of documents in a cause of action styled Bell v. Bell, Civil Action Number 63534 D-2 in the Superior Court of Bibb County, State of Georgia.

INTERROGATORY NO. 5: With respect to calendar years 1981 through 1985 to date, state for each year whether or not you had income in addition to the salary paid to you by your primary employer.

ANSWER: The defendant objects to answering this interrogatory because the information sought is not reasonably calculated to lead to the discovery of admissible evidence.

As to the discovery aspects of this case, the record will reflect to this Court that petitioner made no pre-trial motion to compel discovery, nor did the

district judge make any finding that the failure to admit certain matters was without good cause.

B. RULE 11 VIOLATIONS. Under this heading the Petitioner advised the district judge and the Fifth Circuit Court of Appeals that the Respondent and his attorney have repeatedly filed papers containing "frivolous defenses, misrepresentations of fact, and misrepresentations of law." Among the instances complained of, the Court upon receipt of the record, will find the following allegations:

1. In responding to Petitioner's Motion for Judgment on the Pleadings Respondent told the district court that the motion relied upon affidavits and copies of pleadings in other litigation, all of which were attached to the motion, when in reality only an affidavit was attached.

2. In answer to the complaint Respondent raised as a defense that the complaint "failed to state a claim or cause of action upon

which relief may be granted" when in fact the district court found that it did state a claim.

3. After admitting the jurisdictional allegations of the complaint the Respondent asserted that the lower court should abstain from exercising its diversity jurisdiction in this case.

4. In his answer Respondent denied that he was in arrears under the Georgia judgment when at trial the district court found that he was in arrears (though not in the amount claimed by the Petitioner).

5. In his response to Petitioner's Motion for Judgment on the pleadings, Petitioner attached copies of certain Georgia cases but miscited them for the propositions for which they stand.

6. In his response to Petitioner's Motion for Sanctions in the district court the Respondent stated that Petitioner had previously filed four motions for sanctions when she had actually filed Rule 11 objections.

Additionally, during the course of the litigation below the Respondent, through counsel, requested enlargements of time for various reasons, to all of which Petitioner objected. The record will

reflect that enlargements of time were requested (1) for Respondent to obtain new counsel when the law partner of the undersigned (Petitioner's first attorney) retired from practice; (2) to secure additional time to file a response to the Motion for Judgment on the Pleadings; (3) to secure additional time to respond to Petitioner's Motion for Summary Judgment. These requests for enlargement of time were granted by the magistrate. Further, Respondent requested a continuance of the bench trial in this case because the Respondent, a veterinary professor, was to chair a seminar on that date. This motion for continuance was denied by the district judge and the trial proceeded as set. As Petitioner states in her Petition for Writ of Certiorari, this litigation took only ten months from filing of the complaint through entry of judgment after trial.

C. VIOLATION OF LOCAL RULE C-10. In this area the Petitioner complained that the Respondent refused to admit for the purposes of the pre-trial order relevant matters which were not in good faith controverted. That portion of the pre-trial order denominated as "Contested Issues of Fact" is reproduced as an Appendix hereto. The entire pre-trial order will be included in the record should the Court elect to review this case. The Respondent feels that it would be more economical of time and space for the Court simply to review the appended material.

D. VIOLATION OF 28 U.S.C. 1927. Respondent alleged before the district court and the Fifth Circuit that the undersigned attorney violated the cited statute by unreasonably and vexatiously multiplying and proliferating the proceedings in this case. The gravamen of this

offense in the Petitioner's eyes is that Respondent's attorney resisted the original complaint by filing an answer which Petitioner viewed as full of "frivolous" defenses, by resisting the Petitioner's Motion for Judgment on the Pleadings, and by contesting the Petitioner's Motion for Summary Judgment. The record will reflect that the Motion for Judgment on the Pleadings and the Motion for Summary Judgment were denied by the district court. Likewise, the Court will note that, after a bench trial on the merits, the district court denied a portion of the relief requested by the Petitioner.

Also attached as part of the Appendix hereto is a copy of the docket sheet which was certified as part of the record from the district court, showing all the filings in this case.

REASONS TO DENY THE WRIT

The Respondent certainly cannot dispute the Petitioner's assertion that there is a conflict between the circuits as to amended Rule 11, F.R.C.P., and associated federal statutes and rules. Quite obviously the law is in a state of flux regarding Rule 11. However, for several reasons the Respondent believes that the instant case is not a proper one in which to set out Rule 11 law and harmonize the holdings of the various circuits. Those reasons are:

A. The factual context of the instant case is not easily applicable to a broad range of Rule 11 situations.

B. The district judge's participation in the proceedings provided him with knowledge of the facts and he found that the conduct of neither party warranted sanctions.

C. The Fifth Circuit may have misconstrued the holding of the district court regarding sanctions.

D. In the absence of specific findings by the district court and the Court of Appeals, this Court must determine sua sponte whether violations of the rule occurred and, if so, whether the trier of fact abused his discretion in refusing to impose sanctions.

E. There was no show- cause hearing before the district court.

F. The alleged Rule 11 violations do not represent the unreasonable kind of conduct that Rule 11 seeks to deter.

Each of these reasons will be discussed briefly below.

A. THE FACTUAL CONTEXT. This case is domestic in nature, having been commenced in the district court by a complaint to domesticate a Georgia judgment, to enforce same, and to find Respondent in contempt for failure to abide by the terms of the Georgia judgment. Petitioner had filed an enforcement and contempt proceeding in the Georgia courts prior to commencing the federal action, and those

Georgia proceedings had been terminated prior to the institution of the federal court action. Discovery in the prior Georgia proceeding caused some of the discovery difficulty in which the Petitioner complains in the instant appeal. She did not, however, file any pre-trial motions to compel discovery, which she had the opportunity and obligation to do if she was unhappy with discovery responses.

The Respondent respectfully submits that a more factually sanguine case can be found by this Court that would be more generally applicable in the eyes of the bench and bar to Rule 11 situations. Admittedly, Rule 11 violations can occur in a domestic case just as easily as in any other, but Respondent believes that enterprising counsel will be able to factually distinguish this case from their

own more "normal" kinds of federal litigation, especially in the discovery aspects of this litigation.

B. THE FINDING OF THE DISTRICT COURT. The district court's order on the issue of sanctions is found in the Appendix to the Petition for Writ of Certiorari. The district court found that, while neither party was what it termed a "model litigant", the conduct of neither party had risen to the level required before sanctions are imposed.

The district judge was privy to the entire course of this litigation. He was able to consider all the various pleadings and memoranda which were filed and he heard the evidence at the bench trial of this case. He was obviously, therefore, conversant with the course of the litigation at the time he refused to impose sanctions. However, he did not in his

opinion articulate each offense complained of by the Petitioner, nor did he make any determination that any particular act or omission complained of was a violation of the rules. In short, the district judge did not refuse to impose sanctions in the face of any finding that some activity was a violation of Rule 11 or any other rule or statute.

What the district judge did say was that none of the conduct of the parties rose to the level required for violations to be found and sanctions imposed. Therefore, he denied the Petitioner's request for sanctions.

C. THE OPINION OF THE COURT OF APPEALS. The opinion of the Fifth Circuit on the issue of sanctions is found on pages 1 through 13 of the Appendix to the Petition for Writ of Certiorari. The

Respondent respectfully suggests that the Court of Appeals misconstrued what the district court found when it stated:

> The district court in the present case found that "the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules." We understand the district court to have concluded that, although there may have been violations of the rules, the appropriate sanction under the circumstances of this case was no sanction. (A.11)

The district court did not find that there were any violations of the rules. If violations had been found, the district judge would have imposed sanctions.

In her brief to the Court of Appeals on this issue the Petitioner amplified her complaints made first to the district court in her Rule 11 Motion for Sanctions. What is important here is that the Court of Appeals stated:

> We have examined the plaintiff's contentions and the record in this case and "are not left with

> a "'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant facts.""' (Citations ommitted) (A.12)

The Court of Appeals had an opportunity to consider at length the facts and circumstances of this case. That court determined that the district judge had not committed a clear error of judgment in failing to impose sanctions. They left it alone.

D. FINDINGS MUST BE MADE BY THE SUPREME COURT. Neither the district court nor the Court of Appeals made any finding that any act or omission complained of by the Petitioner amounted to a violation of the rules. Therefore, the threshold activity for this Court must be to determine whether or not the fact-finder abused his discretion. If this Court determines sua sponte that obvious rule violations

occurred which the district judge ignored, then this Court must conduct an examination of the conduct complained of for the purpose of determining if sanctions should or should not have been imposed.

The Respondent respectfully submits that the foregoing procedure will be cumbersome at best for this Court. The Respondent suggests that the Court would be better served if it chose a more procedurally straightforward case.

E. THE ABSENCE OF A SHOW-CAUSE HEARING. The Advisory Committee's Notes are rather uninformative as to the procedure to be used in Rule 11 situations:

> The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with

> full knowledge of the relevant facts and little further inquiry will be necessary.

In Rule 11 situations some courts have issued show cause orders followed by written submissions. Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984). Some courts have required a full-blown hearing on Rule 11 matters. Miller v. Affiliated Finan. Corp., 600 F. Supp. 987 (N.D. Ga. 1984). Some courts have heard argument of counsel on the issue. Weisman v. Rivlin, 598 F. Supp. 724 (D.D.C. 1984). On the other end of the spectrum, some courts have denied the necessity for a hearing. Rodgers v. Lincoln Towing Serv., Inc., 596 F. Supp. 13 (N.D. Ill. 1984).

In the instant case there was no show-cause hearing. The Respondent was certainly in no position to complain about that since the district judge considered the Petitioner's motion and declined to

impose sanctions. The Respondent respectfully suggests that the absence of a show-cause hearing on the sanctions issue taints the instant case as a vehicle for this court to enunciate substantive Rule 11 law.

F. THE NATURE OF THE ALLEGED RULE VIOLATIONS. Earlier herein the Respondent set out examples of the kinds of conduct about which Petitioner has complained to the district court and to the Court of Appeals. The Respondent respectfully suggests that the conduct at issue does not amount to the unreasonable kinds of conduct that Rule 11 seeks to deter.

The Court's attention is drawn to the following instances where the conduct rose to the level requiring Rule 11 sanctions:

1. An attempt to relitigate discrimination claims previously dismissed for failure to state a claim. Cannon v. Loyola University of Chicago, 784 F.2d 777 (7th Cir. 1986).

2. A motion to set aside a stipulation of the parties to dismiss suit was interposed solely for the purpose of delay. Chevron U.S.A., Inc., v. Hand, 763 F.2d 1184 (10th Cir. 1985).

3. Filing a removal petition in bad faith. Davis v. Veslan Enterprises, 765 F.2d 494 (5th Cir. 1985).

4. Baseless claim of federal jurisdiction by pro se litigants. Hilgeford v. People's Bank, 776 F.2d 177 (9th Cir. 1985).

5. After one lawsuit was dismissed with prejudice, two others were filed that were virtual carbon copies of the first. Cook v. Peter Kiewit Sons Co., 775 F.2d 1030 (9th Cir. 1985).

6. Counsel filed a complaint on the basis of diversity when he knew there was not complete diversity. Weisner v. Rivlin, supra.

7. When a witness refused to allow the videotaping of a deposition, counsel moved to cite him for contempt rather than move for order allowing the videotaping. Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985).

The Respondent submits that in this case this Court will not be dealing with conduct similar to the conduct set out in the foregoing cases.

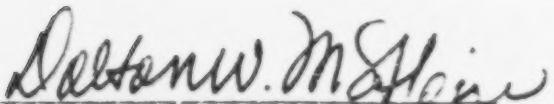
CONCLUSION

Professor George C. Cochran, writing in the Fifth Circuit Reporter, stated the Respondent's position very succinctly:

> The key to the Rule's proper functioning, however, will be a judiciary sensitive to the proposition that it is intended to curb what has been perceived as serious abuses of the Article III system. Hopefully, armed with this understanding, it will not become an in terrorem measure chilling - once and for all - the creative advocacy so valued by our profession. (Vol. 3, No. 5, at page 223)

For all the reasons herein stated, the Respondent respectfully requests this Court to deny the writ of certiorari.

Respectfully submitted,



DOLTON W. McALPIN,
ATTORNEY FOR RESPONDENT

APPENDIX

9. The contested issues of fact are as follows:

In Domestication Suit: NONE

In Contempt Proceedings:

PLAINTIFF'S CONTENTIONS:

Defendant having refused to stipulate the following facts which Plaintiff contends are conclusively established by Defendant's responses, or failure to respond, to Plaintiff's Requests for Admissions of Fact, they are listed as disputed issues of fact for purposes of this pre-trial order, pending a ruling by the court, at the evidentiary hearing, on the binding and conclusive effect of Defendant's Responses to Plaintiff's Requests for Admission Numbered 5 and 12 and Defendant's failure to either respond or interpose a proper objection to Requests 3, 6, 11, 13, 14, 15, 16, 19, and 23:

(1) In a letter dated April 30, 1982, Defendant stated to Plaintiff: "I had asked you about allowing me to look after the educational expenses of Ansley and the $500/month I would continue to pay go toward making up that which I am deficient (about 8 months). Since you did not answer my request, I gather that is not to your liking."
[Admitted by Defendant's response to Request #5]

(2) Ansley was transferred by her employer, Burroughs Corporation, from Macon to Augusta in the spring of 1982.
[Admitted by response to Request #12]

(3) Defendant made no payments to the education fund during the months of July 1981 through March 1982 [stipulated by the parties] but resumed payments to the education fund on or about April 1, 1982.
[Request #3, to which Defendant refused to respond]

(4) From April 1982 through April 1983 Defendant paid $7062.82 into the education fund.
[Request #6, to which Defendant refused to respond]

(5) Ansley was enrolled as a student in Mercer University's part-time graduate program in business administration from June 1981 until the spring of 1982.
[Request #11, with respect to which Defendant claimed lack of knowledge]

(6) Ansley enrolled as a night student at Augusta College in September 1982 but withdrew when her employer transferred her to Atlanta in October 1982.
[Request #13, with respect to which Defendant claimed lack of knowledge]

(7) Ansley entered Mercer University's Walter F. George School of Law in August 1984 and is presently enrolled as a second-year student.

[Request #14, with respect to which Defendant claimed lack of knowledge]

(8) Defendant has paid nothing into the education fund for any month since March 1982.

[Request #15, to which Defendant refused to respond]

(9) The parties' daughter Elizabeth completed her undergraduate education in 1977, worked for one year, and entered Mercer University's law school in September 1979.

[Request #15, with respect to which Defendant claimed lack of knowledge]

(10) Tom's one-year internship in a teaching hospital was a prerequisite to his obtaining a license to practice medicine.

[Request #19, with respect to which Defendant claimed lack of knowledge]

(11) Tom did not need a license to practice medicine in order for him to pursue his studies and perform his duties as a resident in ophthalmology.

[Request #23, with respect to which Defendant claimed lack of knowledge]

DEFENDANT'S CONTENTIONS WITH RESPECT TO CONTESTED ISSUES OF FACT:

a. Whether or not Ansley, the daughter of the parties, started night classes in Augusta, Georgia, while working for Burroughs Corporation.

b. Whether or not in the spring of 1979 the Defendant told the Plaintiff that he thought the separation agreement had been a mistake and that he would cease honoring it whenever he chose.

Mixed Issues of Law and Fact:

a. Whether or not the training perceived by two of the children of the parties, post-college, fall within the purview of the separation agreement and triggered payments of $500 per month by Defendant into the educational fund.

b. Whether or not the internship and residency served by the son of the parties, after he received his medical degree, fall within the purview of the separation agreement and triggered payments of $500 per month into the education fund.

c. Whether or not the post-college and post-M.D. training received by Ansley and Tom were part of their 'formal education' so as to trigger Item Six of the separation agreement.

Plaintiff objects to Defendant's statement of "mixed issues" in that the parties' obligations to make payments to the education fund and Defendant's obligation to provide medical and hospitalization insurance for the children were triggered by entry of the Georgia judgment in 1974. Defendant appears to be contending in this lawsuit that the event which the parties agreed upon as the event which would terminate those obligations occurred at some point in the past, and the foregoing statement of issues does not reflect that.

10. The contested issues of law are as follows:

In the Domestication Suit:

PLAINTIFF'S CONTENTION:

(1) Whether full faith and credit must be given to a final foreign judgment for payment of alimony and child support.

DEFENDANT'S CONTENTION:

(1) Whether or not the divorce decree rendered by the Georgia Court is entitled to full faith and credit in Mississippi.

In the Contempt Proceedings:

PLAINTIFF'S CONTENTIONS:

(1) Whether graduate studies in business administration at an accredited institution of higher learnings are "formal education"

within the meaning of that term as used in Item Six of the parties' incorporated agreement.

(2) Whether an accredited law school's three year course of study leading to a J.D. Degree is "formal education" within the meaning of that term as used in Item Six of the parties' incorporated agreement.

(3) Whether the training which medical school graduates undergo as interns or residents in accredited teaching hospitals and medical schools is "graduate training" within the meaning of that term as used in Item Four of the Parties' incorporated agreement.

(4) Whether the three-year course of study leading to a J.D. Degree at a university's law school is "graduate training" within the meaning of that term as used in Item Four of the parties' incorporated agreement.

DEFENDANT'S CONTENTION:

(1) Whether or not the case is ripe for entry of a contempt order by this court.

DIST.	OFF	DOCKET YR.	DOCKET NUMBER	FILING DATE MO	DAY	YEAR	J	N/S	O			23	$ DEMAND	MAG. NO.	COUNTY	DEM.	YR.	NUMBER
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0537	1	85	0193	04	24	85	4	890	1	4	1			37BA	88888		85	193 D

PLAINTIFFS

BELL, MILDRED BAILEY

DEFENDANTS

BELL, JOHN THOMAS, JR.

CA 86-4196
86 4321

CAUSE

28 USC 1332 (CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE) jw

Domestication of foreign judgment

ATTORNEYS

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☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID			STATISTICAL CARDS	
DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
4/24/85	011906-$60		JS-5	
4/21/86	013324-$70		JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 9/81)

DATE	NR.	BELL v BELL — PROCEEDINGS — EC85-193-LS-D	
		IJ: 3/3-/85 DISC: 9/30/85	PTC: 11/13/85 TRIAL:
4/24/85	1	COMPLAINT	PROCESS issued-hnd pltf
5/13/85		RETURN	Ack of Rec of S/C by deft on 5/1/85.
/20/85	2	ANSWER (D)	to Complaint.
		ORDER/DISC.	Stipulation due 6/3/85.
6/6/85	3	MOTION/NOTICE (P)	for JUDGMENT & for ORDER to SHOW CAUSE.
	4	AFFIDAVIT	of MILDRED B. BELL in support of Mo to Show Cause.
6/21/85		STIPULATION	Disc - 3 months.
6/24/85		ORDER (JAD-6/21/85)	DEADLINES. Disc - 9/30/85; Join or Amend 8/16/85; PTM 10/25/85. PTC 11/15/85, 10 Aberdeen.
7/5/85	5	MOTION (Atty Richard Wise)	to WITHDRAW as deft's atty.
7/8/85	6	RESPONSE (P)	to atty's MO to Withdraw.
7/22/85	7	ORDER (JAD-7/18/85)	GRANTING Atty Richard Wise leave to withdraw as deft's counsel & GRANTING deft 30 days to file appearance of new c
8/7/85	8	NOTICE OF APPEARANCE	of Dolton W. McAlpin as atty for deft.
8/14/85	9	MEMORANDUM OPINION/ORDER (LTS-8/14/85)	DENYING Pltf's MO for JDGMT on Pldgs and MO for show cause order.
/11/85	10	NOTICES (P)	to TAKE DEPOS of Dr. John T. Bell on 9/25/85; of Elizabeth Joyce on 9/28/85; of Ansley N. Bell on 9/30/85.
9/26/85	11	WITHDRAWAL OF NOTICE (P)	to TAKE DEPOS of Elizabeth W. Joyce.
10/11/85	12	MOTION/NOTICE (P)	for SJ and SHOW CAUSE ORDER (w/AFFIDAVIT)
0/15/85	13	AFFIDAVIT	of MILDRED B BELL in support of MO for SJ/SHOW CAUSE ORDER (corr of clerical error)
0/16/85	14	MOTION (D)	for ADD'L TIME to respond to Pltf's MO for SJ
	15	ORDER (LTS)	GRANTING Deft to 11/13/85 to respond to Pltf's MO for SJ
0/22/85	16	RESPONSE (P)	to deft's Mo for Extension of Time.
	17	MOTION (P)	for RECONSIDERATION OF EX PARTE ORDER Grant deft extension of time to respond to Mo for and order to vacate.

CIVIL DOCKET CONTINUATION SHEET

NO. EC 85-193-D

PLAINTIFF	DEFENDANT	DOCKET NO.
BELL	BELL	PAGE ___ OF ___ PA

DATE	NR.	PROCEEDINGS
		Disc. 9-1-- PTC. 11/14/85 TRIAL: 1/23/86
10/22/85	18	ORDER (LTS-10/22/85) DENYING pltf's Mo to Reconsider & Vacate Order of 10/16/85.
10/23/85		NOTICE PTC reset 11/14/85 3 p.m.Aberdeen.
11/8/85	19	RESPONSE (D) to pltf's Mo for SJ.
11/14/85		ORDER TRANSFERRING CAUSE TO JUDGE GLEN H. DAVI
	20	REBUTTAL (P) in supportof Mo for SJ.
11/15/85		MINUTES & TAPE PTC 11/14/85. PTO due 12/14. Estimatedf length o One day.
11/21/85		NOTICE NJT 1/23/86, 9 a.m., ABERDEEN
12/10/85	21	MOTION (D) for CONTINUANCE of trial.
12/13/85	22	ORDER (GHD) DENYING pltf's Mo for SJ.
12/23/85	23	RESPONSE (P) to deft's Mo for continuance.
1/2/86	24	ORDER (GD 12/30/85) OVERRULING mo for cont.
1/23/86	25	CIVIL MINUTES Trial 1/23/86 UNDER ADVISEMENT. Plf & Deft to submit proposed findings of fact and conclusion of law within 14 days.
	26	WITNESS/EXHIBIT LISTS
2/24/86	27	MEMORANDUM OPINION (GHD-2/20/86)
	28	JUDGMENT (GHD-2/20/86) in favor of pltf at cost of deft. COB 43, pgs 112-113. Notice to counsel.

JS-6

3/10/86		TRANSCRIPT of evidentiary hrg 1/23/86 before Judge Davidson
3/12/86		BILL of COSTS (P)
3/17/86	29	MOTION/NOTICE (P) for clarification of judgment.
		OBJECTION (D) to Pltf's BILL OF COSTS. cc NLG
		NOTICE of OBJ

DC-111A REV. (1/7

CIVIL DOCKET CONTINUATION SHEET — No. EC 85-193-D-D

PLAINTIFF	DEFENDANT	DOCKET NO. / PAGE ___ OF ___ PAGES
MILDRED BAILEY BELL	JOHN THOMAS BELL, JR.	

DATE	NR.	PROCEEDINGS
3/20/86	30	POST-JUDGMENT MOTION (P) & NOTICE — for SANCTIONS
		REPLY (P) — to deft's objections to pltf's Bill of Costs. Copy to NLG.
3/21/86	31	NOTICE OF APPEAL (P) — from Judgment 2/24/86. ccUSCA and couns
3/25/86		ORDER (GHD) — GRANTING Deft to 4/5/86 to respond to Pltf's MO for SANCTIONS
3/27/86	32	ORDER (GHD) — RETAINING RECORD in DC pending dispositi of Postjudgment Motions cc USCA
3/31/86	33	REPLY (P) — to deft's RESPONSE TO MO FOR CLARIFICATI OF JUDGMENT
4/8/86	34	REPLY (P) — to Deft's RESPONSE TO MO for SANCTIONS
4/15/86	35	ORDER (GHD-4/14/86) — DENYING pltf's Mo for SANCTIONS
	36	ORDER (GHD-4/14/86) — CLARIFYING JUDGMENT. COB 43, pg 142. Noti coun
		ORIGINAL RECORD — ON APPEAL mailed to 5th Circuit
4/23/86	37	MOTION (P) — to SUPPLEMENT RECORD and to CORRECT DOCK
4/30/86	38	ORDER (NLG-4/29/86) — TAXING COSTS in amt of $80.00 to deft. cert. copy to Mrs. Bell & counsel of record.
5/5/86	39	MOTION (P) & NOTICE — for REVIEW OF ORDER ASSESSING COSTS & FOR ENTRY OF NEW ORDER
5/6/86	40	NOTICE OF APPEAL (P) — from ORDER of 4/14/86 DENYING pltf's Po Judgment Motion for Sanctions. CC to 5th Circuit & counsel
5/7/86		PLEADINGS REC FROM JUDGE DAVIDSON
		RESPONSE (D) — to Motion for Judgment on Pleading & Motion for Order to Show Cause dated 6/
		PRE-TRIAL ORDER — signed by Judge Davidson 1/23/86
		RESPONSE (D) — to pltf's Mo for Clarification of Judgm
5/9/86		ORDER (GHD-5/8/86) — ORDER ASSESSING COSTS in amt of $80 adopted by Court.
		ORDER (GHD-5/8/86) — That SUPPLEMENTARY RECORD be sent to 5th Circuit.including all pleadings, br & papers filed with Court
		SUPPLMENTARY RECORD — mailed to 5th Circuit

DC-111A REV. (1/78)

DC 111A
(Rev. 1/79)

CIVIL DOCKET CONTINUATION SHEET

No. EC 85-193-D-D

PLAINTIFF	DEFENDANT	DOCKET NO. ___
BELL	BELL	PAGE ___ OF ___

DATE	NR.	PROCEEDINGS
5/15/86		MOTION (P) FOR SUPPLEMENTATION OF RECORD ON AP cc 5th Circuit
5/23/86		ORDER (GHD-5/23/86) Granting pltf's Mo for 2nd Suppleme record on appeal except for unavail letter from Dolton McAlpin (served on 6/17/86)
		2nd SUPPLEMENT TO RECORD ON APPEAL mailed to 5th Circuit
6/5/86		3rd MOTION (P) to SUPPLEMENT RECORD ON APPEAL. cc 5th Circuit
6/9/86		ORDER (GHD-6/6/86) GRANTING pltf's Mo to supplement re on appeal.
		3rd SUPPLEMENT TO RECORD ON APPEAL in CA 86-4196 CA 86-4321 mailed to 5th Circuit

CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Respondent, hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, that I have this day mailed, postage prepaid, three (3) copies of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to the following party who is proceeding pro se in this Court:

Ms. Mildred B. Bell
516 High Point North Road
Macon, GA 31210

The undersigned is a member of the Bar of this Court.

SO CERTIFIED this the 12 day of March, 1987.

Dolton W. McAlpin

DOLTON W. McALPIN

No. 86-1059

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MILDRED BAILEY BELL, PETITIONER

v.

JOHN THOMAS BELL, JR.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mildred B. Bell
Petitioner, pro se

516 High Point North Road
Macon, Georgia 31210
(912) 477-4021

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TABLE OF AUTHORITIES

No. 86-1059

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MILDRED BAILEY BELL, PETITIONER

v.

JOHN THOMAS BELL, JR.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case is now before the Court on Petition for Writ of Certiorari to review a judgment entered by the Fifth Circuit Court of Appeals affirming a district court Order denying sanctions under the Federal Rules, under 28 U.S.C. § 1927, and under a local rule. The Fifth Circuit rejected Petitioner's contention that since the

record shows on its face that violations occurred the district court erred as a matter of law by refusing to impose sanctions.

SUMMARY OF REPLY

It is noteworthy that in opposing this Petition for Certiorari Respondent has not cited a single case in support of the Fifth Circuit's rulings. Nor has he advanced a single argument on the law as to why the split in the circuits created by the decision below should not be resolved, and resolved immediately, by a pronouncement from this Court (1) that the Federal Rules of Civil Procedure mean exactly what they say--sanctions shall be imposed when the Rules are violated; and (2) that federal appellate courts may not deprive litigants of their right to appellate review by affirming lower court rulings on contentions which have not been considered on the merits.

Respondent argues that the Fifth Circuit's decision was based upon a misconstruction of the district court's Order. Petitioner submits that the decision was based upon the Fifth Circuit's interpretation of the Federal Rules. As the Fifth Circuit interprets those Rules, the Rules do not mandate that sanctions be imposed even if violations did occur.

Respondent argues further that any decesion rendered by this Court in the present case would have only limited applicability because "enterprising counsel" in "normal" federal litigation would be able to distinguish their cases on the facts. This argument will not bear close scrutiny. The Federal Rules do not require responsible, ethical conduct in only some kinds of cases; they prohibit irresponsible conduct in <u>all</u> kinds of cases. The Rules are not concerned with the subject matter of law suits; they speak to the conduct of par-

ties and their attorneys during the course of any kind of case.

Respondent also argues that the conduct he engaged in is not the kind of conduct the Federal Rules seek to deter. That argument is untenable. The Rules themselves specify as prohibited conduct such things as misrepresentations of fact or law and the filing of frivolous defenses and arguments. Respondent did all of those things, and more, in the proceedings below, but he appears to view such conduct as acceptable.

The reasonable inquiry and good faith obligations imposed upon litigants and their attorneys in federal court cannot be bent or modified to accommodate personal opinions of what is or is not acceptable. The Rules set out the standard, and the standard is an objective one.

Those whose personal code of ethics permits them to file "standard boiler-plate" defenses and arguments with the court, to

deliberately misrepresent the facts and law to the court, and to refuse to admit relevant facts that they know to be true have a duty to familiarize themselves with the standard of conduct required by law and to adhere to that standard when litigating in federal court.

I.

RESPONDENT'S CONTENTION THAT CERTIORARI SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT MISCONSTRUED THE DISTRICT COURT'S ORDER IGNORES THE DETRIMENTAL IMPACT THE FIFTH CIRCUIT'S RULING WILL HAVE UPON THE EFFECTIVENESS OF THE FEDERAL RULES IN CURBING ABUSES OF THE JUDICIAL PROCESS IF THIS COURT DECLINES TO REVIEW THAT RULING.

In response to this Court's direction to file a Response to Petitioner's Petition for Certiorari, Respondent argues that the petion should be denied because, inter alia:

> [T]he Court of Appeals misconstrued what the district court found . . . . The district court did not find that there were any violations of the rules. If violations had been found, the district court would have im-

posed sanctions. [Response, p. 16].[1]

By assuming that the district court would have imposed sanctions if violations had been found, Respondent appears to be tacitly acknowledging that sanctions would have been mandatory if violations had occurred, and he appears to be arguing that he did not in fact violate the Rules.

Furthermore, the general tenor of Respondent's argument suggests that if the Fifth Circuit's decision was in fact based upon a misconstruction of unarticulated words in the district court's order--as he

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[1] Respondent appears to be challenging what he perceives to be the Fifth Circuit's misconstruction of the district court's Order. This is, to say the least, somewhat anomalous. Respondent argues that we must assume that the district court found that no violations occurred, because if the district court had found otherwise it obviously would have imposed sanctions. (In other words, we must not impute error to the court.) And yet, he--who did not file a cross-petition for certiorari in this case--argues that the appellate court's judgment affirming the district court's decision was based upon an error made by the appellate court in "construing" the district court's Order.

perceives it to be--the appellate decision is of no importance. Thus, he argues that this Court's first inquiry must be into whether the Record reveals obvious rule violations which the district court ignored, and that if this is answered in the affirmative the Court "must conduct an examination of the conduct complained of for the purpose of determining if sanctions should or should not be imposed." [Response, pp. 17-18]. Such a procedure, he argues, would be so cumbersome that it should not be undertaken by this Court. [Id.].

Respondent's argument overlooks the fact that it is the Fifth Circuit's judgment that is the subject matter of this petition. The threshhold question is whether that judgment raises issues of sufficient importance to warrant review by this Court. If the Court undertakes review, the next question will be whether the specific rulings upon which the Fifth Cir-

cuit's judgment of affirmance was based comply with the relevant Rules and statutes.

This Court's decision with respect to granting the petition for certiorari should not be based upon speculation about what unarticulated findings underlay the district court's Order denying sanctions; it must be based upon a determination of whether the Fifth Circuit's judgment, which creates a split in the Circuits and establishes precedents for its lower courts to follow, should be reviewed by this Court because of the importance of the issues it raises. Those issues are discussed in some detail in the Petition, pages 16-33. [See esp. pp. 23-30].

II.

THE RESPONSE FILED ON RESPONDENT'S BEHALF IN THIS COURT WAS ITSELF IMPROPERLY CERTIFIED AS BEING WELL GROUNDED IN FACT.

It is noteworthy that even at this stage of the proceedings Respondent is either unaware of the certification re-

quirements, does not understand them, or refuses to be bound by them. Respondent has misrepresented the Record to this Court in at least three ways:

(1) On page 6 of his Response, Respondate makes the following statement:

> Among the instances complained of [by Petitioner in the courts below], the Court upon receipt of the record, will find the following allegations[.]

Respondent then goes on to set out six numbered statements--single-spaced and indented, as if they are direct quotations of statements or arguments made by Petitioner. [See Response, pp. 6-7 and S. Ct. Rule 33(c)]. In fact, the statements are <u>not</u> quotations from the Record, and they bear little or no resemblance to the allegations actually made by Petitioner in the courts below. Nevertheless, later in his response Respondent refers the Court to those statements as support for the following :

> The Respondent respectfully suggests that the conduct at issue does not amount to the unreasonable kinds of conduct that Rule 11 seeks to deter. [Response, p.20].

The statements that Respondent falsely presents as direct quotations from the Record are in fact absurd, and Petitioner submits that they were presented in that fashion in order to mislead this Court into believing that the allegations of misconduct were petty, trivial, and without merit.

(2) With respect to the discovery responses filed on Respondent's behalf in the district court, Respondent asserts to this Court:

> Petitioner had filed an enforcement and contempt proceeding in the Georgia courts prior to commencing the federal action, and those Georgia proceedings had been terminated prior to the institution of the federal court action. Discovery in the prior Georgia proceeding caused some of the discovery difficulty in [sic] which the Petitioner complains in

> the instant appeal. [Response, pp. 12-13].

The statement that Petitioner had filed an enforcement and contempt proceeding in the Georgia courts prior to filing her federal court domestication suit is false. Indeed, Respondent himself gave the only testimony in the record concerning the Georgia proceedings, and he testified at the evidentiary hearing that in 1983 he filed suit in Georgia in an attempt to have the parties' incorporated agreement modified. [Reporter's Transcript, pp. 49-50].

Since the Georgia lawsuit was irrelevant in the proceedings below, and certainly is highly irrelevant in this Court, one can only speculate as to why Respondent wanted this Court to believe that Petitioner was the Plaintiff in the 1983 Georgia litigation. But whatever his motive, the statement is false.

(3) While attempting to persuade this

Court that Respondent's attorney did not unreasonably and vexatiously multiply and proliferate the proceedings, Respondent states that

> [Included] as part of the Appendix hereto is a copy of the docket sheet which was certified as part of the record from the district court, showing all the filings in this case. [Response, p. 10].

While the docket sheet probably should show all filings, the docket sheet in this case does not do so, and this fact is well known to both parties.

More than 60 documents were actually filed in the district court, but many of those documents were not entered on the docket sheet, apparently because they were filed with the judge and not sent to the clerk's office.[2]

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[2]The record as originally certified to the Fifth Circuit contained 147 pages; in response to Petitioner's repeated motions to have the entire record sent up, three supplemental volumes (consisting of 247, 23, and 7 pages, respectively) were

In the "Record Excerpts" filed in the Fifth Circuit, Petitioner provided that court and Respondent himself with a chronological list of all papers filed in the district court and where they can be found in the record, along with photocopies of both the docket sheet and the cover sheets of the Supplemental Records (which listed the documents contained therein and the dates filed or served). Despite this, Respondent presented the docket sheet alone to this Court, stating that it showed "all filings in the case." And he did so in support of his contention that he had not proliferated the proceedings below.

III.

RESPONDENT'S ARGUMENT THAT CERTIORARI SHOULD BE DENIED IN THIS CASE BECAUSE "ENTERPRISING

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ultimately certified as part of the record on appeal. A few of those pages represented post-judgment motions and orders; a few represented papers which had been properly entered on the docket sheet but not sent up with the original record, but most represented documents filed throughout the proceedings which had <u>not</u> been entered on the docket.

COUNSEL WILL BE ABLE TO FACTUALLY DISTINGUISH THIS CASE FROM THEIR OWN MORE 'NORMAL' KINDS OF FEDERAL LITIGATION" IS WITHOUT MERIT; THE REQUIREMENTS OF THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT VARY FROM CASE TO CASE MERELY BECAUSE CASES ARE FACTUALLY DISTINGUISHABLE.

Respondent may be correct in his assertion that if this Court rules upon the issues raised by the Fifth Circuit's decision in this case "enterprising counsel will be able to factually distinguish this case from their own more 'normal' kinds of federal litigation." [Response, pp. 13-14]. However, if Respondent is suggesting that such distinctions could be used to avoid a decision by this Court with respect to the obligations imposed upon litigants and their attorneys by the Federal Rules, then Petitioner submits that he is incorrect.

If an appropriate sanction is mandated by the Rules when the Rules have been violated, as other Circuits consistently have held, then an appropriate sanction is man-

dated in any case in which violations occur. The language of the Rules at issue in this case cannot properly be said to have one meaning in some circumstances, another meaning in others. The Rules govern the manner in which litigation is conducted, and their requirement that litigation be conducted in a responsible manner is unrelated to both the nature of the claim and the dollar amount involved.

CONCLUSION

The protections afforded federal court litigants by the Federal Rules of Civil Procedure should be available to all litigants--in every district in every Circuit--in cases where the amounts involved are small as well as in those where the amounts are large.

Petitioner respectfully submits that it may reasonably be assumed that egregious abuse of the legal process is most likely to occur, and most likely to go unpunished,

in cases where the monetary stakes are small and appeal is unlikely because of the high additional costs involved. If that is a reasonable assumption, then it would seem to follow that the most abusive cases will seldom reach this Court. While it is true that all litigants have the right to proceed pro se in order to minimize the financial burden, as a practical matter most litigants cannot do so.

Petitioner respectfully submits that the Record in this case provides an incredible, irrefutable example of the abusive tactics being employed by some litigants and their attorneys--tactics which clearly are proscribed by the Federal Rules.

For the reasons set forth above and in the Petition itself, Petitioner urges the Court to grant the Petition and summarily reverse the Fifth Circuit's decision, thereby establishing beyond dispute that the plain language of the Federal Rules is

the law of the land with respect to the obligations imposed upon litigants and their attorneys in federal litigation, and with respect to the duty of the lower courts to see that those obligations are met.

Respectfully submitted,

Mildred B. Bell
Petitioner, pro se

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